No. 92-283

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In The Supreme Court Of The United States

OCTOBER TERM, 1992

RONALD L. DIXON and
DONALD J. NAEGELE,

Petitioners,

v.

OGDEN NEWSPAPER, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the West Virginia Supreme Court of Appeals, in accord with well-settled principles of First Amendment law enunciated by this Court in, inter alia, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, reh'g denied, 467 U.S. 1267 (1984) and Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), correctly reversed the judgment entered by the trial court, on the grounds that the public figure plaintiffs failed to present clear and convincing evidence that the newspaper articles at issue were published with actual malice and that the articles were

incapable of a defamatory meaning, as a matter of law, following a complete and independent appellate review of the factual record as a whole?

2. Whether special and important reasons exist, warranting the exercise of this Court's discretion to grant the writ sought, where the principles of First Amendment law applied by the court below were correctly interpreted and have been well settled by this Court, making such review purely episodic?

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 416 S.E.2d 237. A copy of the opinion also appears in the Appendix ("A") to the Petition for Writ of Certiorari at A-5. The Order of the West Virginia Supreme Court of Appeals denying the Petition for Rehearing appears in the Appendix to the Petition for Writ of Certiorari at A-1.

The Order of the Circuit Court of Ohio County, West Virginia, denying defendant's motions in the alternative for judgment notwithstanding the verdict, or for a new trial, appears in the Appendix beginning at A-59. The opinion and order of the Circuit Court of Ohio County, West Virginia, denying defendant's Motion for Summary Judgment

in the Naegele case appears in the Appendix beginning at A-72. The Judgment Order of the Circuit Court of Ohio County, West Virginia, entered on November 10, 1988, appears in the Appendix beginning at A-69.

STATEMENT OF THE CASE

Respondent Ogden Newspapers, Inc. ("Ogden"),[1] contends that the Statement of the Case set forth in the Petition for Writ of Certiorari is overblown and argumentative, not the concise Statement of the Case required by the Rules of this Court. Therefore, respondent Ogden provides the following succinct and concise Statement of the Case.

---

[1] There is no parent or subsidiary company to be listed per Rule 29.1 of the Rules of United States Supreme Court.

Petitioners Dixon and Naegele were policemen employed by the City of Wheeling when a trial took place in magistrate's court for Ohio County in Wheeling. The proceedings of that trial were observed and reported by Warren Bays, a reporter employed by The Intelligencer and assigned to cover the court system in Ohio County and Wheeling.

The magistrate's court trial arose out of the allegation by another city policemen, Robert Heldreth, that he had been threatened over the telephone by George Stefanow, a Wheeling tavern owner, because of Stefanow's belief that his name had allegedly been used by Officer Heldreth to gain access to the "Green Door," a suspected house of prostitution located in Wheeling.

The testimony of Stefanow at the trial in magistrate's court was reported by a court reporter at the direction of the prosecuting attorney for Ohio County and the reporter's notes were transcribed after the trial and were a part of the record of this case upon appeal to the West Virginia Supreme Court.

At the magistrate court trial, Bays took written notes of the testimony. He did not have available nor access to any electronic recording device at the magistrate's court. Warren Bays transcribed his notes, as a part of his normal duties for The Intelligencer, after the conclusion of the trial in the late afternoon of May 2, 1983, before the deadline for inclusion in the next edition of The Intelligencer, a morning

newspaper. The reports by Bays, which appeared as two separate news stories in The Intelligencer, can be found in the Appendix to Petition for Writ of Certiorari. A-144; A-150.

These two news stories formed the basis for the libel actions filed by Dixon and Naegele, despite the fact there is no question but that the contents of the two stories were true and accurate:

> Q. (Underwood) Everything that appears in the article which was in the second session (sic) and which is headlined 'Stefanow Found Innocent in Phone Threat' is true in the same as what was in the first article; isn't that correct?
>
> A. (Dixon) Insofar as it goes, yes sir. (Transcript of trial court ("Tr.") at 204).

* * *

> Q. (Metzner) when you say the articles are okay as far as they go, what do you mean by that?
>
> A. (Dixon) Well, the articles that I gave - George Stefanow article is true to the extent when he called me in my official capacity as a sergeant on the front desk, I gave him information that was allowed to be given to anyone who tried to obtain that information. And that I did not give him information prior to those raids so as to prevent the raids from taking place. But that's what I felt they were trying to put - were trying to say or at least inferring that I had done and I didn't do that. (Tr. 212).

See also Tr. 186-188, 200-201 (Testimony of Dixon). Naegele's testimony was to the same effect. Tr. 325-326. Stefanow also conceded that the articles about his criminal trial were essentially correct. Tr. 103-107.

In their respective libel actions, Dixon and Naegele each contended that his reputation had been damaged by the only inference that could be drawn by the reader from the stories, to wit: that they each had given information concerning a police raid upon the Green Door to George Stefanow, Naegele's brother-in-law, and that the information was given to Stefanow before the raid took place, indicating official misconduct and interference with the vice raid.

The allegation of libel framed by the pleadings was not that arising from the publication of false facts, misleading headlines or opinion - the issue was that of innuendo or inference which the petitioners claimed was

perforce dictated by the publications, and that the innuendo or inference was molded intentionally and with "actual malice." It was petitioners' contention that Bays had intentionally designed the story to require this innuendo as a consequence of a conspiracy between Bays and Lieutenant Joseph Davis of the Wheeling Police Department to damage the reputation of Officers Dixon and Naegele.

As a consequence of trial in the Circuit Court of Ohio County, Dixon and Naegele were each awarded $250,000 for compensatory damages and $50,000 punitive damages. Post-judgment motions of the defendant led to the elimination of the punitive damage award but left intact compensatory damages of a half-million dollars.

By Order dated February 27, 1992 the West Virginia Supreme Court of Appeals, the court of last resort in the State of West Virginia, reversed the judgment entered for Dixon and Naegele by the Circuit Court of Ohio County on the ground that the petitioners failed to present clear and convincing evidence, as a matter of law, that the newspaper accounts were published with the actual malice required under New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny, and further, that the petitioners failed to establish, as a matter of law, the falsity of the newspaper accounts. In so doing, the West Virginia Supreme Court of Appeals correctly relied upon and applied principles of First Amendment Law

relevant to libel actions filed by public figures which have been stated and reaffirmed by this Court since 1964. The West Virginia Supreme Court correctly reversed on the ground that the judgment entered upon the jury verdict rendered on behalf of the plaintiffs was unsupported, as a matter of law, by clear and convincing evidence of actual malice and further, that the articles were incapable of a defamatory meaning, as a matter of law.

SUMMARY OF ARGUMENT

The petition for writ of certiorari filed by Ronald L. Dixon and Donald J. Naegele should be denied because there are no "special and important reasons" for the granting of said petition. In

reversing the trial court's entry of judgment upon the jury verdict for plaintiffs, the West Virginia Supreme Court of Appeals, the state court of last resort, correctly applied principles of federal constitutional law which have been established and continually reaffirmed by this Court since New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

ARGUMENT

I. THE PETITION PRESENTS NOTHING NOVEL, CONFLICTING, SPECIAL OR IMPORTANT AND THUS, ALTHOUGH JURISDICTION IS PRESENT, THERE ARE NO COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION.

Pursuant to Rule 10 of the Rules of United States Supreme Court, a writ of certiorari is granted not as a matter of

right but pursuant to the discretion of this Court. As a preliminary matter jurisdiction must be present, pursuant to 28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

It cannot be denied that respondent's First Amendment rights under the federal constitution, exercised pursuant to its circulation of the newspaper, The Intelligencer, have clashed with petitioners' rights under state law to protection from libel. Thus, in this action brought under state libel law, respondent defended by asserting a federal constitutional privilege, thereby invoking the jurisdiction of this Court once final judgment was entered by the highest court of West Virginia on May 13, 1992.

However, "[t]he presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction for the issuance of the writ is discretionary."

Hammerstein v. Superior Court of California, 341 U.S. 491, 492 (1951). A grant of certiorari issues "only when there are special and important reasons therefor." Rule 10, Rules of United States Supreme Court. No such reasons are presented by the petition herein.

> 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341, 80 L.Ed. 688, 707, 56 S.Ct. 466.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955) (emphasis added).

Moreover, Rule 10 itself sets forth the characteristic circumstances in which the decision of a state court of last resort will most likely be granted review:

> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The matter at bar does not fall within any of the characteristically reviewable situations set forth in Rule 10. The federal principles discussed and applied by the West Virginia court in its

decision below have been well settled by this Court, beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and its progeny, and the West Virginia court interpreted and applied the principles correctly, duly citing to New York Times Co., supra, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, reh'g denied, 467 U.S. 1267 (1984) and Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), where appropriate.

The instant petition is merely petitioners' attempt to secure an "episodic" review of what they perceive to be an incorrect application of well settled federal constitutional principles to this particular and specific set of facts. Nothing novel, conflicting or

especially important is presented by this petition. Even a cursory review of the decision rendered by the West Virginia court of last resort demonstrates that it undertook an independent appellate review of the evidence presented at trial as required, see Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) and Bose Corp., supra, and as previously, properly interpreted by the West Virginia court in Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674 (1975), cert. denied, 423 U.S. 882, reh'g denied, 423 U.S. 991 (1975), Mauck v. City of Martinsburg, 167 W.Va. 332, 280 S.E.2d 216 (1981), and Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778 (1986), and it determined, as a matter of law, that the public figures failed to present clear

and convincing evidence that the allegedly libelous newspaper articles were published with actual malice. The West Virginia court framed the issues as follows: "[T]herefore, we must determine first whether Bays' articles were capable of a defamatory meaning, and, if so, whether the judgment entered for the plaintiffs was supported by clear and convincing proof of actual malice." Dixon v. Ogden Newspapers, Inc., 416 S.E.2d 237, 241 (W.Va. 1992); A-23. Following a tedious independent review of the evidence presented at trial, the West Virginia court answered both questions in the negative, and properly reversed the judgment.

In determining the appropriate standard for review, the West Virginia

court relied directly upon this Court's decision in Bose Corp., 466 U.S. 485, quoting as follows:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"

Bose Corp., 466 U.S. at 511, quoted in Dixon, 416 S.E.2d at 241; A-22. Following a thorough review of the evidence with the federal standard as its guide, the West Virginia court concluded:

> Thus, after reviewing both the transcript of the proceedings below and the contents of the two newspaper

> articles written by Warren Bays, we conclude that the plaintiffs did not present the clear and convincing evidence of actual malice that public officials are required to show in order to sustain an action for libel. Actual malice must be proven with convincing clarity, and the plaintiffs in this case simply did not offer sufficient evidence to meet this standard.
>
> For the foregoing reasons, the judgment of the Circuit Court of Ohio County is reversed.

Dixon, 416 S.E.2d at 245; A-40.

II. THE WEST VIRGINIA COURT CORRECTLY CONCLUDED THAT THE NEWS ARTICLES WERE INCAPABLE OF A DEFAMATORY MEANING, AS A MATTER OF LAW.

Although the West Virginia court's analysis of defamatory capability is not nor could it be completely separate and distinct from its analysis of actual

malice, it is clear that the West Virginia court correctly interpreted and relied upon applicable federal constitutional law principles. This is manifested by a review of the following portions of the West Virginia decision:

> Although it is evident from the transcript that Stefanow never used the word 'sources' or 'informants' to describe the plaintiffs, the article accurately reported Stefanow's reluctance to respond when questioned about who 'informed' him of the raid. When asked, 'Would you tell us the names of those police officers that gave you information?', Stefanow replied, 'I will not because it would tend to incriminate them.' When considered within this context, Bays' use of the words 'sources' or 'informants' was not inappropriate, and it certainly could be not characterized as a 'knowing falsehood.'

Dixon, 416 S.E.2d at 242-43; A-29-30. In a footnote signaled at the end of this

passage, the West Virginia court explained its justification for that conclusion:

> In Masson v. New Yorker Magazine, Inc., 501 U.S. ____, ____, 111 S.Ct. 2419, 115 L.Ed.2d 447, 472 (1991), the United States Supreme Court addressed the issue of whether actual malice is demonstrated through the publication of a quotation with the full knowledge that the quotation does not contain the exact words used by a public figure. The court rejected this strict standard, with Justice Kennedy writing back, "[i]f an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation."

Id. at 243, fn. 5; A-30-31. The West Virginia court properly applied and cited to applicable federal law in rendering its conclusion that the articles at issue

were not capable of a defamatory meaning, as matter of law.

III. THE COURT BELOW PROPERLY INTERPRETED AND APPLIED THE "ACTUAL MALICE" STANDARD.

Regardless of the level of explicitness with which the West Virginia court rejected Dixon and Naegele's contention that the articles were false and capable of defamatory meaning, the court was quite clear in its finding that the judgment entered on behalf of the plaintiffs was not supported by clear and convincing evidence of actual malice, as that term has been defined by this Court in cases involving alleged defamation of public officials.

The appropriate federal standard, as delineated in Harte-Hanks Communications,

Inc. v. Connaughton, 491 U.S. 657 (1989),

was correctly interpreted and applied:

> The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. Bose Corp. v. Consumers Union of United States, Inc. 466 U.S., at 510-511, 80 L.Ed.2d 502, 104 S.Ct. (1949). This rule is not simply premised on common law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of '"breathing space"' so that protected speech is not discouraged. Gertz, 418 U.S., at 342, 41 L.Ed.2d 789, 94 S.Ct. 2997 (quoting NAACP v. Button, 371 U.S. 415, 433, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); New York Times Co., 376 U.S. at 272, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (same).

Harte-Hanks, 491 U.S. at 685-86.

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," Bose, 466 U.S. at 499-500, 80 L.Ed.2d 502, 104 S.Ct. 1949, the reviewing court must "'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,'" New York Times Co., 376 U.S., at 285, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (quoting Pennekamp v. Florida, 328 U.S. 331, 335, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946)).

Id. at 688-89.

Petitioners incorrectly contend that the West Virginia Supreme Court of Appeals implicitly disregarded the jury's determination of witness credibility by

its reversal, in contravention of the principles enunciated in Harte-Hanks. That is not the case. Instead, the West Virginia court properly recognized the importance of independent appellate review of the evidence where First Amendment privileges are at stake, as opposed to the garden variety tort case:

> In Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 211 S.E.2d 674, 681 (1975), this court stated that '[u]nder the mandate of New York Times v. Sullivan, supra, it is incumbent upon an appellate court in determining the validity of a libel judgment both to consider the law and to make an independent evaluation of the evidence to insure First Amendment protection to publishers.' '[W]here First Amendment rights are implicated, courts have applied a stricter standard in judging the sufficiency of a complaint.' Long v. Egnor, 176 W.Va. 628, 346 S.E.2d 778, 782 (1986). In Syl. pt. 2 of Mauck v. City of Martinsburg, 167

> W.Va. 332, 280 S.E.2d 216 (1981), we stated that as a result of New York Times v. Sullivan 'whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law. . . .'

Dixon, 416 S.E.2d at 241; A-21-22. Nowhere in its opinion did the West Virginia court challenge the credibility of any of the witnesses but rather, it questioned the sufficiency of the evidence presented by petitioners.

The West Virginia court tediously "examine[d] for [itself] the [articles] in issue and the circumstances under which they were [printed and determined that] they are of a character which the principles of the First Amendment . . . protect." See Harte-Hanks, 491 U.S. at 688. This was premised upon a proper

determination that the plaintiffs did not present sufficient evidence to surpass the "clear and convincing" threshold required before a finding of "actual malice" will be sustained.

The "factual record in full", id., includes not only the oral testimony and evidence which could be drawn therefrom, but also the allegedly libelous newspaper articles. The West Virginia court's review of the content of the articles in the context of the circumstances mandated the conclusion that the articles themselves were substantially true. Therefore, the Court concluded that unless the petitioners had presented clear and convincing evidence of an intentional omission of the timing "of the vice raid information disclosure in

order to leave readers with the impression that the [petitioners] wrongfully supplied Stefanow with information," Dixon, 416 S.E.2d at 244; A-38, the judgment below would have to be reversed. The court noted that petitioners asserted a "conspiracy theory" at trial, in support of a finding of actual malice on the part of respondent's reporter:

> The [petitioners'] evidence of actual malice consisted primarily of alleged conspiratorial ties between Intelligencer reporter Warren Bays and the Wheeling Police Department. Bays and Chief of Detectives Joseph Davis were admittedly personal friends. Bernard 'Sonny' Watson, who was an employee of George Stefanow, testified that when Bays and Davis were leaving the courtroom after Stefanow's trial, Davis said something to the effect of 'get those m-f-'s' and that Bays then nodded

> and winked [grinned] in response.
>
> The plaintiffs also cited Bays' two May 3, 1983 newspaper articles as further evidence in support of their conspiracy theory. They argue that both articles contained exaggerated, distorted, and misleading renditions of the substance of Stefanow's testimony.

Id. at 241; A-24-25.

In its independent review, the West Virginia court carefully compared the evidence of the circumstances and the testimony received at the magistrate court trial, to the articles themselves. The court ultimately concluded, inter alia, as follows:

> Evidence that a media defendant intentionally 'avoided' the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel. In this instance, this Court is

> convinced that the judgment for the plaintiffs must be reversed unless the newspaper intentionally omitted the time of the vice raid information disclosure in order to leave readers with the impression that the plaintiffs wrongfully supplied Stefanow with information. Evidence of such behavior would support the conclusion that the newspaper published the article with knowledge that it was 'false or misleading' or with a reckless and willful disregard of the truth. However, this is unquestionably a difficult thing to prove with 'convincing clarity,' and we do not believe it was done by the conspiracy theory advanced by the plaintiffs in this case.

Id. at 244; A-38-39.

The West Virginia court made no assertions with regard to the "credibility" of the evidence presented in furtherance of the conspiracy theory but simply concluded that the evidence

was insufficient, as a matter of law, to support a finding of actual malice.

Respondent submits that the West Virginia court properly found, upon independent appellate review, failure of petitioners to present the "clear and convincing" evidence necessary to establish that the articles under attack were published with actual malice. Petitioners relied on a scintilla of "conspiracy" evidence, winking and nodding, which is merely colorable and not significantly probative. There was the sole contention that the respondent's reporter nodded and winked when a superior of the petitioners made a derogatory comment about getting them. Such evidence, standing alone, was so lacking in probative value that the West

Virginia court had no choice but to reverse the judgment, as it did by a vote of five to zero.

The West Virginia court's reversal of the trial court's judgment is also consistent with this Court's decision in Time, Inc. v. Pape, 401 U.S. 279, reh'g denied, 401 U.S. 1015 (1971). In Pape, this Court explained the important distinction between a "falsified" news report and an "erroneous" news report for purposes of First Amendment privilege:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under New York Times. To permit the malice issue to go to the jury because of the

omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.

New York Times was premised on a recognition that, as Madison put it, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot's Debates on the Federal Constitution 571 (1876). With respect to errors of fact in reporting events, we said in New York Times: "A rule compelling the critic of official conduct to guarantee truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to . . . 'self-censorship'. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have

> recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S., at 279, 11 L.Ed.2d at 706, 95 A.L.R.2d 1412.
>
> These considerations apply with even greater force to the situation where the alleged libel consists in the claimed misinterpretation of the gist of a lengthy government document. Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of "truth" that would not put the publisher virtually at the mercy of the unguided discretion of a jury.

Pape, 401 U.S. at 290-91.

With regard to the magistrate court trial about which the allegedly libelous articles reported, petitioners concede

that "Bays admittedly was (at the least) consciously confused about the post-raid time frame of Stefanow's discussions with Dixon and Naegele and knew that at the time he wrote the news articles of May 3, 1983." Petition for Writ of Certiorari to the Supreme Court at 66. In this regard, the West Virginia court noted:

> . . . reporter Warren Bays testified that the whole day in court was confusing. When he was questioned about exactly when Dixon and Naegele gave Stefanow information about the raid, Bays stated, 'I think it was unclear to an awful lot of people.'[ ] Bays also testified that it was 'absurd' to charge that he purposely omitted the time of the information transfer. He pointed out that his articles did not state that the information was given out either prior to or after the raid.
>
> We believe it is necessary to emphasize that the implication that the plaintiffs

> were engaged in wrongdoing was not raised first by Bays' omission of the time frame information in his articles, but by Stefanow's testimony, in which he related his fear of 'incriminating' the officers. This exchange between Stefanow and the prosecution was reported with substantial accuracy in Bays' article. Bays also wrote that, '[t]here was no testimony as to exactly what was discussed between Stefanow and the police officers.' It is important to note as well that in his article, Bays included Police Chief Weith's comment that Stefanow's testimony in and of itself was not indicative of wrongdoing. Weith stated that he would 'study the testimony given' to determine if 'official police business had been leaked out.'

Dixon, 416 S.E.2d at 243; A-32-34.

In accord with principles of Pape, the West Virginia court correctly found that insufficient "conspiracy" evidence was presented, given the ambiguous tone of Stefanow's testimony, to establish a

jury issue on the question of actual malice and thus, the court's reversal properly rescued respondent's First Amendment rights from the "unguided discretion of a jury." Pape, 401 U.S. at 291.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals should be denied.

Respectfully submitted this 11th day of September, 1992.

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Respondent

FILING AND MAILING CERTIFICATE

I hereby certify that on this 11th day of September, 1992, I filed 40 copies of a Brief in Opposition to Petition for Writ of Certiorari with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required (3) copies to William R. Metzner, 2212 National Road, Wheeling, WV 26003.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

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